SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1131

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST C. GRAYSON, Superintendent - Petitioners

versus

JOHN E. HAYCRAFT, Et Al. - - Respondents

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

---

BRIEF FOR RESPONDENTS HAYCRAFT, Et Al. IN OPPOSITION

THOMAS L. HOGAN
3636 First National Tower
Louisville, Kentucky 40202
Counsel for Respondents, John E. Haycraft, Et Al.

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF AUTHORITIES

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1131

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY and ERNEST C. GRAYSON, SUPERINTENDENT - *Petitioners*

v.

JOHN E. HAYCRAFT, ET AL. - - *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

1. Whether a District Court may retain a vestige of state imposed segregation by excluding first graders from a remedial desegration plan?

STATEMENT OF THE CASE

This is another, and hopefully, last chapter in the protected Louisville desegregation case. The original Court of Appeals' decision which held that both the Louisville and Jefferson County had not eliminated "all vestiges of state-imposed segregation" is reported as *Newburg Area Council* v. *Board of Education of Jefferson County, Kentucky* 489 F. 2d 925 (CA 6, 1973, vac.

and remanded at 418 U. S. 918 (1974) for reconsideration in light of *Milliken* v. *Bradley,* 418 U. S. 717 (1974), opinion reinstated, 510 F. 2d 1358 (CA 6, 1974), cert. denied 421 U. S. 931 (1975). Subsequently, the Sixth Circuit issued a Writ of Mandamus ordering Judge James F. Gordon to implement a desegregation plan for the 1975-76 school year. *Newburg Area Council* v. *Gordon,* 521 F. 2d 578 (CA 6, 1975). Judge Gordon implemented that plan with his July 30, 1975 order (App. 31-71).

The Jefferson County Board of Education, now merged with the Louisville Independent system, appealed that order. Judge Gordon's plan was affirmed. *Cunningham* v. *Grayson* 541 F. 2d 538 (CA 6, 1976) cert. denied, 429 U. S. 1074 (1977), pet. reh. den. —— U. S. —— (1977), 98 S. Ct. 250.

Subsequent to that a petition for certiorari was filed by an Intervenor, Louis J. Hollenbach, the County Judge, which further sought to attack the desegregation as being excessive and was also denied by this Court. *Hollenbach* v. *Haycraft* cert. denied —— U. S. ——, 98 S. Ct. 418.

Thus this Court has on numerous occasions had an opportunity to review the constitutionality of the basic desegregation plan that has been in operation in Jefferson County, Kentucky since September 5, 1975.

The subject matter of this petition is concerned solely with the recent Sixth Circuit decision of October 20, 1978. 485 F. 2d 803 (CA 6, 1978) concerning the District Court's order of April 18, 1977 which held "that first grade pupils attending the defendant school

system be and they hereby are exempt from the transportation reassignment provisions of our desegregation plan of July 30, 1975, as amended, and until such time as the kindergarten program is available on a system-wide basis or until further order of this court." (App. 9).

The Sixth Circuit held "that the District Court did not have the discretion to exempt the first grade children from the transportation program because the first graders are entitled as much as older children to an education in a public school system not afflicted by state-imposed segregation and that to exempt those students from the busing plan would be contrary to the Court's mandate that all vestiges of state-imposed segregation be eliminated." (App. 5)

To say that the plight of the first graders in Jefferson County has been an on-again off-again proposition is an understatement.

In the original July 30, 1975 desegregation plan, they were exempted from the transportation provisions for the first quarter of the 1975-76 school year. That order, included in Petitioners' Appendix, contemplated that in the second and third quarters of the school year first graders would be reassigned and transported. The first graders would be transported by classroom unit with their teacher from their home school to their away school for a portion of each day. They were to begin and end each day at their home school.

On December 4, 1975 the School Board made a motion to exmept first graders for the entire school year. That motion was not opposed by Respondents since the

basis of it was that the system lacked the required buses. The District Court entered an Order on December 22, 1975 exempting first graders for the 1975-76 school year only.

On March 22, 1976 the Board then filed a motion to exempt first graders permanently. That motion was later limited to the 1976-77 school year. The Board further implemented a cross cultural human relations program which is presumably still being utilized.

The District Judge, by order entered April 1, 1976, exempted first graders for the 1976-77 school year.

Plaintiffs, Respondents herein, filed a Notice of Appeal of that decision on April 5, 1976.

That appeal was withdrawn, at the specific request of Judge James Gordon when he informed all parties in an open hearing held on May 4, 1976 that he would not exempt first graders after the 1976-77 school year.

Subsequently, however, the Board again filed on April 1, 1977, a motion to exempt first graders permanently until there is a county wide kindergarten program. No where in the record, as found by the Sixth Circuit, is there any indication when the contingency might, if ever, be met.

On April 18, 1977 Judge Gordon entered an order exempting first graders from the desegregation remedy (App. 9).

The Sixth Circuit reversed and found that District Court may not "order a remedy of limited scope which leaves many who have suffered violations of their constitutional rights without redress." (App. 5)

It is from this Opinion of the Sixth Circuit, limited solely to the first grade exemption, that review is sought.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The law of this case is clear. The Jefferson County Board of Education was found guilty of violating the constitutional rights of each and every child in Jefferson County, Kentucky. Newburg I, 489 F. 925 (CA 6, 1973). The Sixth Circuit ordered the District Court to eliminate "all vestiges of state-imposed segregation" 489 F. 2d at 932. The plan that would have done that has been upheld by the Court of Appeals and review has been denied by this Court on four separate occasions. The Board has not eliminated segregation "root and branch" by continuing to exempt first graders from the desegration remedy. *Green* v. *County School Board of New Kent County.* 391 U. S. 430, 437.

The mere fact that some first grades are statistically desegregated because of retention rates may be an indictment of the educational process but it is by no means a desegregation plan that promises "realistically to work now." *Green, supra* 391 U. S. at 439.

There is no conflict among the Circuits that have ruled on the exemption of first graders. The Sixth Circuit has now joined the Fifth where in *Flax* v. *Potts,* 454 F. 2d 865 (CA 5, 1972) that Court reversed a District Court's plan that exempted first graders because it was held not to eliminate all vestiges of state-imposed segregation.

And the Eight Circuit in *Clark* v. *Board of Education of Little Rock School District,* 465 F. 2d 1044 (CA 8, 1972) held similarly that the exemptions "appears to be a last ditch effort to retain a segregated school system" 465 F. 2d at 1047.

The Petitioners erroneously rely on *Dayton Board of Education* v. *Brinkman* 433 U. S. 406 (1977) in challenging the Sixth Circuit decision. As Mr. Justice Brennan stated in concerning:

> "The Court today reaffirms the authority of the federal courts" to grant appropriate relief of this sort [i.e. busing] when constitutional violations on the part of the school officials are proved. *Keyes* v. *School District* No. I, Denver, Colorado 413 U. S. 189 (1973)

Here in a *de jure* situation the violations have been shown manifestly. That is the law of the case. To acknowledge the violation and impose no remedy is to ignore every desegregation case since *Brown* v. *Board of Education,* 347 U. S. 483 (1954).

I. A District Court May Not Constitutionally Exempt All First Graders Indefinitely From a Desegregation Plan.

Petitioners are asking this Court to issue a Writ of Certiorari to review the decision rendered in this case by the United States Court of Appeals for the Sixth Circuit on October 20, 1978. That decision related solely and exclusively on the failure to provide for a remedy for the constitutional violations of segregating the first grade students in the Jefferson County System.

Surprisingly, most of their petition is devoted to a polemic on the desegregation plan in chief. That plan has been before this Court on four separate occasions. *Cunningham* v. *Grayson,* 541 F. 2d 538 (CA 6, 1976) cert. denied. 429 U. S. 1074 (1977), pet. reh. den. 430 U. S. 941 (1977), motion to file second pet. reh. den. —— U. S. ——, (1977) 98 S. Ct. 250 and *Hollenbach* v. *Haycraft* cert. den. —— U. S. —— (1977) 98 S. Ct. 418.

If there is any question that this *de jure* case is at all factually similar to the *de facto* situations in Dayton or Columbus, Ohio then the Court need only to be shown the clear distinction made by the Sixth Circuit in the original remand at 510 F. 2d 1358 (CA 6, 1974) cert. den. 421 U. S. 931 (1975).

Suffice it to say that there is, one, and only one, issue clearly before this Court. That is, the constitutionality of the District Court's refusal to afford meaningful desegregation to an entire class of children—i.e. first graders. That is the only issue with which the Sixth Circuit dealt.

In lieu of desegregating the first grades on the same basis as all other grades, the Board proposed and the District Court accepted a "cross-cultural plan for first grade students." (App. 15). The plan consists basically of skits, field trips, and the like.

The District Court concluded that that plan was sufficient to meet the goal of desegregating the first grades. He also included a "voluntary transfer program" in which students could attend the school to which they would have been bused. The Court of Ap-

peals correctly held that this did not constitute a plan to remove all vestiges of state-imposed segregation.

Games, skits, and fun field trips may be educationally innovative but they do not rise to the level of a constitutionally permissible desegregation plan in a system that has been found guilty of *de jure* segregation.

Or as stated by the Tenth Circuit in *Dowell* v. *Board of Education of Oklahoma City Public Schools,* 465 F. 2d 1014, 1016, (CA 10, 1972):

> "The constitutional mandate is not for integrated experiences; but for a desegregated school system."

The District Court made much ado about the alleged frailities of first graders. In certain instances this may well be true. Thus, Respondents did not object to the inclusion in the original plan of a Hardship Policy that could deal with individual children regardless of their age. (App. 48-50). Children, be they first graders, fifth graders, or ninth graders should be treated as individuals in this type of situation. Respondents would never claim that we are dealing with mere statistics to be shuffled around like pawns on a chess board. If a *particular* child, first grade or otherwise, has a problem that can legitimately exempt him/her from transportation then procedures have been set up to accommodate that child. But it does not follow that since *some* children will have a longer distance to travel or *some* children have not had pre-school experience that therefore an entire group of 10,000 children can or should be denied their constitutional right to a desegregated education.

Or as stated by the Sixth Circuit "a District Court (may not) order a remedy of limited scope which leaves many who have suffered violations of their constitutional rights without redress." (App. 5).

As stated earlier there are only two Circuits who have dealt with the "unique" problem of first graders. In *Clark* v. *Board of Education of Little Rock* 465 F. 2d 1044, 1047 (CA 8, 1972) the Court said:

> "It is argued that the plan for grades 1 through 3 in the eastern and western section should be approved because students attending the segregated classes in these grades will be doing so in school building that house integrated 4th or 5th grades. This argument is without merit. See: *Jackson* v. *Marwell School District No. 22.* 425 F. 2d 211 (CA 8, 1970).
>
> It flies in the face of the clear mandate of *Clark* v. *Board of Education of Little School District,* 449 F. 2d 493 (CA 8, 1971) cert. den. 405 U. S. 936 which requires the desegregation process *to apply fully to all elementary grades."* (Emphasis added).

As further pointed out in *Clark,* 465 F. 2d supra at 1046 ft. 5, this Court in *Swann* v. *Charlotte-Mechlenburg Board of Education,* 402 U. S. 1. (1971) specifically approved a desegregation plan that included first graders.

Petitioners raise the issue that somehow by including first graders in desegregation there is the imposition of an "additional remedy" (Pet. brief p. 9). There is no additional remedy. There is only a basic remedy. As the Court of Appeals found previously there was

none. If transportation were an "additional remedy" for first graders then a cultural program and voluntary transfer would have been acceptable for all grades. However, this Court has never found that solution to constitute a constitutionally acceptable desegregation plan. Nor should it here.

There is nothing in the record to indicate that first graders are treated differently than other children in the system.

In fact, in rejecting a first grade exemption the Fifth Circuit stated in *Flax* v. *Potts* 464 F. 2d 865, 869 (CA 5, 1972) that:

> "We find no justification for the non-inclusion of first grade students. They are part of the normal curriculum of the district and entitled to a full and equal integrated education."

As correctly stated by Petitioners in their brief, "This Court has repeatedly emphasized the authority of the district courts to grant appropriate relief when a constitutional violation is properly demonstrated." (Pet. brief. p. 20) However, this Court has never given its imprimateur to the proposition that a violation may be found, but no remedy or an inadequate remedy, granted. That is what Petitioners seek.

The transportation of children away from their neighborhoods may be an unfortunate legacy that this generation must endure. It has become an emotional issue, a political issue and unfortunately a racist issue. Particularly when a school board attempts to use small children in its desire to perpetuate constitutional viola-

tions. The fact is that the Jefferson County Board of Education has had twenty-four years to "do right." For whatever reasons they elected not to do so.

Disappointally, they are grasping at their last hope of retaining some semblance of segregation. This Court and this nation has gone too far in trying to eradicate the past to allow this type of legalistic jabberwocky to prevail.

CONCLUSION

The Petitioners have either misread or misstated the applications of the decisions in *Washington* v. *Davis,* 426 U. S. 229 (1976) and *Dayton Board of Education* v. *Brinkman,* 433 U. S. 406 (1977). This is not an employment testing case nor is it a *de facto* desegregation case. The Sixth Circuit has amply demonstrated the myriad violations by the School Board involved here. The record is clear, concise, and conclusive.

This Court, the Sixth Circuit, and the District Court has evaluated their decision in light of any subsequent decisions and affirmed the original plan. There is no reason to upset a plan, in effect since September of 1975 because of the fallacious argument submitted by the Board.

Therefore the petition should be denied.

Respectfully submitted,

THOMAS L. HOGAN
3636 First National Tower
Louisville, Kentucky 40202

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Response were hand delivered to Will H. Fulton, 2510 First National Tower, this 11 day of February, 1979.

THOMAS L. HOGAN
3636 First National Tower
Louisville, Kentucky 40202